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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

VAN GESNER,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

MARION R. BIGGS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

JOHN NEWTON WILLIAMSON,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON APPEAL.

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BRIEF OF DEFENDANT IN ERROR ON APPEAL.

The appeal in the case of the *United States v. Williamson* ought to be dismissed because it appears from the admission of his attorneys, formally made

in their opening brief in the above-entitled causes, at page 2 thereof, that

"Prior to the writ of error in this case the defendant Williamson, who was a representative in Congress, had sued out a writ of error to the Supreme Court of the United States, based upon the holding of that Court in the *Burton* case, that a sentence of imprisonment against a member of Congress involved a constitutional question, giving the right of appeal direct to that Court. At the time the writ of error was sued out in this case the constitutional question in the *Burton* case had never been decided. This writ of error to this Court in the *Williamson* case was sued out after the writ to the Supreme Court, and out of abundance of caution in case the writ to the United States Supreme Court should be dismissed upon jurisdictional grounds.

"The jurisdiction of this Court, therefore, in the *Williamson* case depends upon whether the United States Supreme Court shall entertain jurisdiction thereof, and if it holds that it has jurisdiction to pass upon the merits, then the proceeding in this Court necessarily fails."

It is admitted on behalf of the defendant in error that a writ of error to the Supreme Court of the United States was sued out by the defendant Williamson, one of the plaintiffs in error herein, at a time prior to his suing out of the writ of error in the same identical case which is now before this Court;

and it is further admitted on behalf of the defendant in error that said writ of error so taken by the defendant Williamson to the Supreme Court of the United States is now still pending there on appeal.

Under the circumstances this Court has no jurisdiction to entertain the appeal in the *Williamson* case, and the same ought to be dismissed upon its own motion. A party who desires to appeal from a judgment in a criminal case direct to the Supreme Court of the United States upon the ground that his sentence involves a constitutional question must elect whether he will take his writ of error or appeal to the Supreme Court upon that constitutional question alone, or to the Circuit Court of Appeals upon the whole case.

McLish v. Roff, 141 U. S. 661.

INDICTMENT SUFFICIENT.

Plaintiffs in error demurred to the indictment upon the ground that it "is not direct and certain as "to the crime charged or the particular circum- "stances of the crime. And that it does not set "forth the name or identity of the persons the de- "fendants are charged with having conspired to "suborn, and does not describe or identify the per- "jury which is alleged to have been suborned, insti- "gated and procured, or the land as to which such "perjury was to be committed."

Additional grounds for holding the indictment insufficient were set forth in a motion in arrest of

judgment, but those grounds are unimportant and they are not the character of objections that can be urged for the first time after verdict.

The indictment is sufficient as against a general demurrer and as against the particulars just hereinbefore set forth. The offense charged is conspiracy under Section 5440, Revised Statutes of the United States, to commit an offense against the United States, to wit: the offense of subornation of perjury. If the parties to the conspiracy did not, at the time they entered into it, agree upon the identity of the persons whom they intended to suborn to commit the perjury, nor upon the identity of the particular land which they intended to suborn persons to acquire for the benefit of defendants, it requires no argument to demonstrate that it is not necessary to allege those facts in the indictment with any greater particularity than they were described or identified by the parties at the time they entered into their unlawful agreement, which constitutes the offense for which they were indicted.

In order to sustain the demurrer upon the grounds specified, it would be necessary to hold that the conspiracy would not be unlawful unless the parties specifically agreed upon the identity of the persons whom they intended to procure to acquire the lands for them, nor unless they likewise specifically agreed upon the identity of the lands which they expected to thus acquire by means of their unlawful agreement.

It is urged, however, that the indictment is not sufficient and does not state an offense because it does not allege that the persons to be suborned to commit perjury would "willfully" swear falsely; we must not lose sight of the fact that the offense charged in this indictment is conspiracy and not perjury. In this indictment the unlawful agreement is the offense and the perjury which is to be committed is merely the object of the unlawful agreement.

> "In stating the object of the conspiracy the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent sufficient to identify the offense which the defendants conspired to commit is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as a crime which was agreed to be committed, the chief purpose of pleading is obtained. Enough is then set forth to apprise the defendants so that they may make a defense. The point urged seems more refined than sound."
>
> *United States v. Stevens,* 44 Fed. Rep. 141.

The foregoing case is directly in point, and was followed by Judge Bellinger in the case of *United States v. Wilson,* 60 Fed. Rep. 891.

In the last-mentioned case Judge Bellinger said:

> "In indictments for conspiracy the offense which the defendants are accused of having conspired to commit need not be set out with the same degree of strictness that is required where the indictment is for the commission of the offense itself. All the decisions upon this point are to the effect that certainty to a common intent is all that is necessary."

And again, in the same case, Judge Bellinger says:

> "This construction may be liable to technical objection, but the strictness that answers such objection is not, as has already been shown, regarded in the description of an offense where the indictment is for a conspiracy to commit such offense."

In the case of *United States v. Eddy,* 134 Fed. Rep. 114, Judge Hunt says:

> "The steady tendency of the courts of the United States undoubtedly is to disregard forms, even though they be mistaken in expressing the substance of crimes in indictments, if the meaning can be understood, and if the bill charges the offense in such a way as clearly to inform the person of the violation of the law with which he is charged, and protect him in the event of conviction or acquittal, against a second trial for the same offense."

It may be conceded that it must appear from a fair construction of all the language of the indictment that the defendants intended that the false oaths to be made by the persons suborned should be "willfully" made by them, but it is not necessary that this element of the offense shall be charged only by the use of that particular word. It is sufficient if it is charged in equivalents. At common law in this particular, perjury was defined to be a

> "willful, false oath by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question whether he believed it or not."
>
> 2 *Chit. Cr. L.,* 302.

Thus, it will be seen that the offense had to be "willful," but it was well settled at the common law that the use of that identical word in an indictment was not necessary, it being implied from the words "falsely, maliciously, wickedly, and corruptly." 2 *Chit. Cr. L.,* 309; *Ar. Cr. Pl.* 429. See also *United States v. Howard,* 132 Fed. Rep., 350 and 351.

In referring to this and kindred questions in the case last cited, Judge Hammond says:

> "The district attorney is certainly correct in his contention that Rev. St. Sec. 1025, precludes the necessity that either one of these essential averments in an indictment for perjury shall be in any particular form, no matter how that form may be sanctioned by precedent and long usage; if the averment appears in any form, or may, by fair construction, be found anywhere within the text of the indictment, it is sufficient."

Judge Hammond cites a large number of decisions by Federal courts illustrating how liberally the Supreme Court of the United States has discarded niceties of form only and requirements that are not material to save the rights of the defendant to be notified of the nature of the offense with which he is charged and to enable him to plead any judgment which may be rendered in the case as a bar to subsequent prosecutions, which is all that he has a right to demand.

In the case of *United States v. Rhodes,* 30 Fed. 431, Mr. Justice Brewer, when he was a circuit court

judge, in construing Sec. 1025 of Rev. St. of the U. S., said:

> "While a defendant should be clearly informed in the indictment of the exact and full charge made against him, yet no defect or imperfection in matter of form only—and this includes the manner of stating a fact—which does not tend to his prejudice, will vitiate the indictment."

Speaking through Circuit Judge Gilbert, this Court applied the same rule, and particularly in the case of *Noah v. United States,* 128 Fed. Rep. 272.

It is alleged in the indictment in the case at bar that at the time of making their false oaths the suborned persons would then be applying to enter and purchase lands of the United States under the Timber and Stone act, in the manner provided by law, and that they would then swear that the lands " were not being purchased by them on speculation " but were being purchased in good faith to be ap- " propriated to the own exclusive use and benefit of " those persons respectively, and that they had not, " directly or indirectly, made any agreement or con- " tract, in any way or manner, with any other per- " son or persons whomsoever by which the titles " which they might acquire from the said United " States in and to such lands should inure in " whole or in part to the benefit of any person " except themselves, when, in truth and in fact, " as each of the said persons would then " well know, and as they the said John Newton

" Williamson, Van Gesner, and Marion R. Biggs,
" would then well know, such persons would be ap-
" plying to purchase such lands on speculation and
" not in good faith to appropriate such lands to
" their own exclusive use and benefit respectively,
" and would have made agreements and contracts
" with them, the said John Newton Williamson, Van
" Gesner, and Marion R. Biggs by which the titles
" which they might acquire from the said United
" States in such lands would inure to the benefit of
" the said John Newton Williamson and Van Gesner
" as co-partners in the firm of Williamson and Ges-
" ner, then and before then engaged in the business
" of sheep raising in said county; the matters so to
" be stated, subscribed, and sworn by the said per-
" sons being material matters under the circum-
" stances and matters which the said persons so to
" be suborned, instigated, and procured, and which
" the said John Newton Williamson, Van Gesner,
" and Marion R. Biggs would not believe to be
" true."

Here is a specific charge that the applicants would swear that they were not taking the lands for speculation and that they were purchasing the lands in good faith to appropriate them to their own exclusive use and benefit respectively, and that they had not, directly or indirectly, made any agreement or contract, in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the United States

in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact they then well knew and the defendants then well knew that they would be applying to purchase such lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have previously made agreements and contracts with the defendants by which the titles which they might acquire from the United States in such lands would inure to the benefit of the defendants, and that the persons so swearing would not then believe their aforesaid statements to be true and that the defendants would not then believe the aforesaid statements of said persons so swearing to be true.

Moreover, it is alleged in the indictment that the defendants conspired "to unlawfully, willfully, and "corruptly suborn, instigate, and procure a large "number of persons, to wit, one hundred persons, "to commit the offense of perjury in the said dis- "trict by taking their oaths there respectively before "a competent officer and person in cases in which a "law of the said United States authorized an oath "to be administered, that they would declare and "depose truly that certain declarations and depo- "sitions by them to be subscribed were true, and by "thereupon, contrary to such oaths, stating and "subscribing material matters contained in such

" declarations and depositions which they should " not believe to be true."

If before making his application to purchase the land the entryman had made and entered into a contract by which his title would inure to the benefit of another, and if his sole purpose in applying to purchase the land was to obtain title to it in order to benefit another person, it is difficult to imagine how it would be possible, under any fair construction of our language, to imply that the taking of his oath in the particulars mentioned would not be willful, false swearing. The elements of willfulness are averred by stating the acts themselves, and the omission of the technical word "willful" becomes immaterial and ought not to vitiate the indictment. The entryman was not bound to apply for the lands, and he did not apply for them inadvertently, and he did not apply for them under duress. On the contrary, it is specifically alleged that before applying for them he entered into an agreement with the defendants that he would apply for them in the manner prescribed by law.

As was said by Justice Brewer, in the case of *United States v. Clark,* 37 Fed. 107:

> "Can it be possible that the defendant was mislead by the language of this indictment as to the exact offense with which he was charged? Did he for a moment suppose that he was charged with putting in the post office something of which he was entirely ignorant, or did he understand from the ordinary meaning of the language used that he was charged with

> putting in the post office an obscene picture—that which he knew to be obscene? I can have no doubt that he was fully informed as to the charge against him, and not in the slightest degree mislead. I am fully aware that there are authorities which do not concur with this view, and yet I think those authorities adhere too closely to the rigor and technicality of the old common-law practice, which, even in criminal matters, is yielding to the more enlightened jurisprudence of the present,—a jurisprudence which looks evermore at the matter of substance and less at the matter of form."

Can it be possible that the defendants in this case were mislead by the language of this indictment, and did not know that they were charged with having conspired to suborn certain persons to wilfully swear falsely? Did the defendants for a moment suppose that they were charged with having conspired to suborn persons to inadvertently or by duress swear falsely?

In the case of *Dunbar v. United States,* 156 U. S. at page 193, Justice Brewer, speaking for the Supreme Court, says:

> "The language of the indictment quoted *excludes the idea of any unintentional and ignorant* bringing into the country of prepared opium upon which the duty had not been paid, and is satisfied only by proof that such bringing in was done intentionally, knowingly, and with intent to defraud the revenues of the United States."

The contract between the defendants and the persons suborned in the case at bar excludes the idea

of any unintentional and ignorant or inadvertent false swearing. Under the circumstances it was utterly impossible for any person, after entering into such a contract, to apply to purchase lands under the Timber and Stone act without willfully and knowingly swearing falsely to matters and things which he did not believe to be true. Everyone is presumed to intend the natural and inevitable consequences of his acts. The persons suborned could not have agreed to convey the land before applying to purchase the same without intending to willfully and knowingly swear falsely in applying to purchase the same.

In the case of *Babcock v. United States,* 34 Fed. 874, Justice Brewer sustained an indictment for subornation of perjury from which the word "willfully" was omitted, and we especially invite the attention of this Court to his statement of the matter at page 876.

In the case of *Wright v. United States,* 108 Fed., at page 810, the Circuit Court of Appeals of the Fifth Circuit, through Circuit Judge Shelby, says:

> "The omission of words that would add nothing to the meaning of an indictment seems so clearly a defect of form only, with the application of this statute (Sec. 1025 R. S. of the U. S.) is apparent."

In that case, that Court said:

> "To apply the language of Mr. Justice Peckham, no one reading the indictment could come to any other conclusion in regard to its mean-

> ing, 'and when this is the case and indictment is good enough.' Price v. U. S., 165 U. S. 311. We think that the Circuit Court did not err in overruling the demurrer to the indictment. So far as it is necessary to protect the real rights of the defendants we cannot adhere too closely to the technicalities of the old common-law practice, but in matters of form not involving substantial rights, the rigor and technicality of such practice 'must yield to the more enlightened jurisprudence of the present.' "

In *Connors v. United States,* 158 U. S. 408, Mr. Justice Harlan, referring to the defects in an indictment, said:

> "Nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the Court to require a more restricted or specific statement of the particular mode in which the offence charged was committed. Rev. Stat. Sec. 1025. There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offence with which he was charged."

It is not conceivable that in the case at bar the defendants were taken by surprise in the progress of the trial as to whether or not the suborned persons were to willfully swear falsely, or that the defendants were in doubt as to the fact that they were being tried for conspiracy to suborn persons to willfully swear falsely. See also *U. S. v. Adler,* 49 Fed. 736.

In the case of *Rosen v. U. S.*, 161 U. S., at page 33, Justice Harlan, for the Supreme Court, says:

> "Of course he did not understand the Government as claiming that the mere depositing in the postoffice of an obscene, lewd, and lascivious paper was an offense under the statute if the person so depositing it had neither knowledge nor notice, at the time, of its character or its contents. He must have understood from the words of the indictment that the government *imputed* to him the knowledge or notice of the contents of the paper so deposited * * * The case is, therefore, not one of the total omission from the indictment of an essential averment, but, at most, one of the inaccurate and imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused."

And at page 34, of the same case, Justice Harlan says:

> "A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar to any other further prosecution for the same crime."

The word "willful" or "willfully" is defined by *Anderson's Dictionary* as follows:

> "In common parlance willful means intentional as distinguished from accidental or involuntary; in penal statutes it means with evil intent with legal malice without ground for believing the act to be lawful.

> "The ordinary meaning of willful in statutes is not merely involuntary but with a bad purpose."

In *State v. Massey,* 97 N. C., 468, it is held that "willfully" in an indictment implies that the act is done knowingly and of stubborn purpose, but not necessarily of malice. In the case of *Woodhouse v. Rio Grande R. Co.,* 67 Texas 419, it is held that the word "willfully" in referring to an act forbidden by law, means that the act must be done knowingly and intentionally—that with knowledge, the will consenting to, designed and directed the act.

The facts alleged in the indictment in the case at bar raised the necessary implication that the subborned persons would knowingly and intentionally swear falsely with a stubborn purpose, and totally excluded the idea of involuntary action, and, consequently, the allegations are the full equivalent of the word "willfully".

In *Archbold's Cr. Pl.* (Cd. 1900, p. 1213), it is said on the subject:

> "The indictment must in the first place charge a conspiracy. And in stating the object of the conspiracy, the same certainty is not required as in an indictment for the offense, etc., conspired to be committed; as, for instance, an indictment for conspiring to defraud a person of 'divers goods', has been held sufficient. So, an indictment charging a conspiracy 'by divers false pretenses and indirect means to cheat and defraud A of his moneys', and it is not neces-

> sary, in order to sustain such an indictment, to prove such a false pretense as would, if money had been obtained on it by one person alone, have been sufficient to sustain an indictment against him for obtaining money by false pretenses."

The object of an indictment is that the charge be so preferred as to enable the Court to see that the facts amount to a violation of the law, and the prisoner to understand what facts he has to answer or disprove.

Forsythe's Constitutional Law, p. 458.

In the case of *Peters v. United States,* 94 Federal Reporter, 127, speaking through District Judge Hawley, this Court said:

> "The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet; and in case any other proceedings are taken against him for the same offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." (Citing a large number of decisions by the Supreme Court of the United States.)

Tested by this rule the indictment in the case at bar is clearly sufficient.

POINT 2.

INDICTMENT CLEARLY CHARGES THAT PERJURY WAS TO BE COMMITTED BY APPLICANTS BOTH IN THEIR "SWORN STATEMENTS" OR PRELIMINARY FILING PAPERS AND IN THEIR "DEPOSITIONS" OR FINAL PROOF PAPERS.

Counsel for plaintiffs in error have severely criticised the indictment upon the ground that it fails to enlighten them as to whether or not the perjury was to be committed in the "sworn statement" which, under the law, is the preliminary paper which must be filed by an applicant to purchase lands from the United States in The Timber and Stone Act, or whether the perjury was to be committed in the "final proof" which the applicant is required to make at the time he perfects his application to purchase the land and pays his money to the Government for the same and receives his final certificate. This criticism is not well founded and is based upon a want of knowledge of the technical terms used by the Department of the Interior and the various land offices throughout the United States in describing the acts to be performed and the papers to be subscribed by an applicant for timber lands. When a complete understanding is had of the provisions of the Timber and Stone Act and of the regulations prescribed by the Commissioner of the General Land Office for the purpose of giving effect to said provisions, it becomes apparent that the indictment is a peculiarly well drawn pleading and that the pleader plainly had in his mind the

exact legal definition of the application to purchase timber and stone land and that he used the words "applying to purchase" and "application" and "declaration" and "deposition" with the most accurate regard for the significance of their respective meanings under the timber and stone law.

An analysis of the Timber and Stone Act shows clearly that any person desiring to avail himself of its provisions acquires no vested right and continues to be merely an "applicant to purchase" up to and including the time that he completes his final proof and pays for the land and thus becomes entitled to a "final receipt".

Any person wishing to purchase land under the Timber and Stone Act must file a paper, which is technically described in the provisions of the Act as "a written statement in duplicate". This "written statement" is in every sense of the term an "affidavit" merely and it is in substance and effect a "declaration" of intention to become a purchaser. The law provides that upon the filing of such "statement" notice shall be published for a period of sixty days, and that after the expiration of said sixty days "if no adverse claim shall have been filed " the person DESIRING TO PURCHASE shall furnish to " the Register of the Land Office satisfactory " evidence," etc. Obviously at the end of the sixty day period of publication "the person desiring to purchase" is still merely "applying to enter and purchase" the land in the manner provided by law.

Moreover, at the end of the period of sixty days which is prescribed for the publication of notice the applicant is for the first time called upon to give "satisfactory evidence" of the existence of certain facts, or in other words, he is then, and not until then, called upon under the provisions of the law and the regulations of the Commissioner of the General Land Office, which have been promulgated for the purpose of giving effect to the provisions of the Act, to make and give his "deposition".

The indictment charges that the defendants conspired to suborn, instigate and procure a large number of persons to commit the offense of perjury by taking their oaths that they would declare and depose truly "that certain DECLARATIONS and DEPOSITIONS by them to be subscribed were true" and by thereupon, contrary to said oaths, stating and subscribing material matters contained in such DECLARATIONS and DEPOSITIONS which they should not believe to be true.

The indictment further charges that the defendants conspired to suborn, instigate and procure a large number of persons "to state and subscribe under their oaths that certain public lands of the said United States lying in Crook County in said District of Oregon open to entry and purchase under the Acts of Congress approved June 3, 1878, and August 4, 1902, and known as timber and stone lands, which those persons would then be APPLYING TO ENTER AND PURCHASE in the manner provided by

law, were not being purchased by them on speculation", &c., "when in truth and in fact as each of the said persons would then well know" and as the defendants would then well know "such persons would be APPLYING TO PURCHASE such lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, by which the titles they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, as co-partners in the firm of Williamson & Van Gesner, then and before then engaged in the business of sheep raising in said county, the matters so to be stated, subscribed and sworn by the said persons being material matters under the circumstances", &c.

The preliminary "written statement" which is required to be filed by any person desiring to avail himself of the provisions of the Timber and Stone Act is designated and described by the General Land Office as a "sworn statement". The blanks issued by the General Land Office and furnished to applicants to be used as a preliminary "declaration of intention to purchase" contains the following printed headlines, to wit:

"Timber and Stone Lands—Sworn Statement."

See Transcript, page 13.

This "sworn statement" is also described by the General Land Office in the same blank in the certificate which must be made by the officer who swears the affiant, as an "affidavit". A copy of the certificate is found on page 14 of the Transcript, and it twice refers to the foregoing "sworn statement" as an affidavit".

The pleader has referred to said "sworn statement" or "affidavit" as a "declaration". The allegation that the person suborned "would declare and depose truly that certain "declarations * * * by them to be subscribed were true" can refer only to the aforesaid "sworn statements" or "affidavits". The word "declarations" specifically and accurately describes such "sworn statements", "written statements" or "affidavits" because said "sworn statements" or "written statements" or "affidavits" are each in substance and effect merely a "declaration of intention to purchase" and consequently such affidavits are properly described as "declarations to be subscribed by the applicants". The term "depositions" would on the contrary, be utterly inappropriate and inapplicable and erroneous. The term "deposition" has a popular as well as a technical legal meaning and while it is a generic expression embracing all written evidence verified by oath and could thus be held to include "an affidavit", yet in legal language a depo-

sition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an "affidavit" is a mere voluntary act of the party making the oath and is generally taken without the cognizance of him against whom it is to be used.

Stimpson v. Brooks, 3 Blatch. 456.

The General Land Office has adopted this legal meaning of the term "deposition" in its blank forms which are furnished to its officers for the purpose of taking the testimony of persons desiring to purchase lands at the time they are making their final proofs under the Timber and Stone Act. One of these blanks appears at pages 302 to 306, both inclusive, of the Transcript. It contains the following headlines in large print, to wit:

"TIMBER AND STONE LANDS.

Testimony of Claimant."

Following the headlines are printed questions numbered from 1 to 15, both inclusive, and then following the signature of the applicant appears a certificate in these words:

"I hereby certify that the above-named ———— " personally appeared before me; that I verily " believe affiant to be the person he represents him- " self to be; and that each question and answer in " the *foregoing testimony* was read to him in my " presence before he signed his name thereto and

" that the same was subscribed and sworn to before
" me at Prineville, Oregon, this 8th day of Decem-
" ber, 1902.

"

"U. S. Commissioner for District of Oregon.

"NOTE: Every person swearing falsely to the
" above *deposition* is guilty of perjury and will be
" punished as provided by law for such offense. In
" addition thereto the money that may be paid for
" the land is forfeited, and all conveyances of the
" land or of any right, title or claim thereto are
" absolutely null and void as against the United
" States.

"I hereby certify that I have tested the accuracy
" of affiant's information and the bona fides of this
" entry by a close and sufficient oral cross-examina-
" tion of the claimant, and his witnesses, directed
" to ascertain whether the entry is made in good
" faith for the appropriation of the land to the
" entryman's own use and not for sale or specula-
" tion and whether he has conveyed the land or his
" right thereto, or agreed to make any such convey-
" ance, or whether he has directly entered into any
" contract or agreement in any manner with any
" person or persons whomsoever by which the title
" that may be acquired by the entry shall inure
" in whole or in part to the benefit of any person
" or persons except himself, and am satisfied from
" such examination that the entry is made in good
" faith for entryman's own exclusive use, and not

" for sale or speculation, nor in the interest nor for " the benefit of any other person or persons, firm " or corporation.

"M. R. Biggs,
"U. S. Commissioner for District of Oregon."

Another of these blanks commences at page 306 of the Transcript and ends on page 309 thereof. The last mentioned blank contains the printed headline,

"Timber and Stone Lands.

Cross-Examination of Claimant in Connection with Direct Examination on Form 4-370."

This blank contains questions numbered from 1 to 10, both inclusive, and ends as follows, to wit:

" In addition to the foregoing the officer before " whom the proof is made will ask such questions " as seem necessary to bring out the facts in the " case." It will be noticed that the "sworn statement" or "written statement" or "affidavit" is not in the form of questions and answers. It is furnished to the applicants to be filled out by themselves and the officer before whom the applicant swears to the same is merely required to certify that " the foregoing affidavit was read to affiant in my " presence before he signed his name thereto; that " said affiant is to me personally known and that I " verily believe him to be the person he represents " himself to be; and that this affidavit was sub- " scribed and sworn to before me this "30th day of " June, 1902".

It is at once apparent that neither the law nor the regulations of the General Land Office contemplate or require that the officer before whom such "sworn statement" or "written statement" or "affidavit" is made shall question or cross-examine the applicant for the purpose of testing the truth or accuracy of the statements contained in his affidavit.

It is equally apparent that the regulations and instructions of the General Land Office do contemplate and require that the officer before whom the "final proof" is made and taken shall interrogate and cross-examine the applicant thoroughly for the express purpose of testing the accuracy and truth of his sworn statements.

In other words, the preliminary paper, which is called a "Sworn statement" or "affidavit" by the General Land Office and which is designated in and by its blanks as such has every element of a mere "affidavit" and is not in any legal sense a deposition".

While, on the other hand, the testimony of the claimant and his witness, which an officer of the Government is required to take at the time the applicant is making his final proof, has every legal element of what is technically termed in law a "deposition". Moreover, this testimony is designated in all the blanks furnished to its officers by the General Land Office for this purpose as a "deposition".

It seems transparently apparent, therefore, that

the pleader in the case at bar used the term "deposition" in its legal sense and in the same sense in which it is used by the General Land Office in its blank forms which are furnished to its officers for the purpose of taking the final proofs of applicants to purchase timber lands. This construction is emphasized by the fact that the pleader has alleged that the persons suborned to commit perjury "would " declare and depose truly that certain declarations " AND depositions by them to be subscribed were " true". If he had said declarations "OR" depositions it would be apparent that he used the two terms synonymously, but he has carefully selected the word "and" instead of the word "or" to accomplish the purpose of his pleading, and it is apparent that the persons applying to purchase the lands were to be suborned to commit perjury at all stages of the proceedings wherein it might become necessary to falsely swear that they had made no contracts to dispose of the lands in order to accomplish their purpose of obtaining title thereto from the United States. In the very nature of things the conspirators must have intended to induce the persons who applied to purchase the lands to swear falsely not only in the preliminary paper called a "sworn statement" or "written statement" or "affidavit" or "declaration", but likewise in giving testimony at the time of making final proof, or in other words, in their "depositions". Obviously, it was the purpose of the conspirators to obtain title to the lands and this could not be done unless the persons

who applied to purchase the same under the Timber and Stone Act would continue to swear falsely at the time of making final proof, and the pleader must have had these facts in his mind when preparing the indictment, and the evidence contained in the transcript of record clearly shows that he did have such facts in his mind and that he intended to and did express this exact meaning in the indictment by the terms "declarations and depositions".

In what sense, therefore, did the pleader use the term "declarations"?

Under the pre-emption laws, so called, every person possessing certain qualifications is entitled to enter one hundred and sixty acres of land after first making a settlement upon the same. Every person who settles upon public land and intends to purchase the same under the pre-emption laws is required by Sec. 2264 of the Revised Statutes of the United States to file within thirty days after the date of such settlement with the Register of the proper district a "written statement" describing the land settled upon and "declaring his intention to claim the same" under the pre-emption laws. A preliminary paper which he is thus required to sign, swear to and file, has always been known and designated by the General Land Office and by the public as a "declaratory statement". The General Land Office furnished blank forms for many years for the use of applicants under the pre-emption laws and those forms contained the printed headlines "declar-

atory statement". The pleader evidently had this in mind when he referred to the applicant's preliminary statement under this Timber and Stone Act as a "declaration". It is unquestionably in substance and effect a "declaration of intention" because the applicant therein "declares his intention to purchase" the land under the Timber and Stone Act, just as a pre-emption claimant in his "declaratory statement" in accordance with the requirements of Sec. 2264, Rev. St. of the U. S., "declares his intention to claim the land under the pre-emption laws".

If the pleader had used the word "affidavits", or the words "sworn statements", instead of the word "declarations", there could have been no shadow of a doubt about his meaning. The word "declarations", however, has been defined by the Supreme Court of the United States in the case of *United States v. Ambrose,* 108 U. S., 340, by Justice Miller as the same as used in Sec. 5392 of the Rev. St. of the U. S. defining perjury. That statute provides that "every person who having taken an oath " before a competent tribunal, officer, or person in " any case in which a law of the United States " authorizes an oath to be administered, that he " will testify, declare, depose, or certify truly, or " that any written testimony, declaration, deposi- " tion or certificate by him subscribed is true, will- " fully and contrary to such oath states or sub- " scribes any material matter which he does not " believe to be true is guilty of perjury", etc.

It will be noticed that the word "affidavit" and the words "sworn statement" are not used in that definition of perjury. No one of the words used in that definition will cover a simple "affidavit" or "sworn statement", unless it be the word "declaration".

In the case just cited, Justice Miller says:

> "We do not think the words declaration and certificate as used in the section of the Revised Statutes on which this indictment is founded are used as terms of art or in any technical sense, but are used in an ordinary and popular sense to signify any statement or material matters or facts subscribed and sworn to by the parties charged."

He further says:

> "The fact that in many acts of Congress cited by counsel, that body has used the word to signify a statement in writing, whether sworn to or not, as a foundation in many cases of official actions, or as *preliminary to the assertion of rights by the party who makes the declaration,* is far from proving that the use of the word in the act concerning perjury is limited to these cases. The inference is strong the other way, for the word is used in the case cited in regard to so many and such divers transactions that it can, in view of them all, have no other meaning than what is attached to it in ordinary use, and in all these instances it is equivalent to a statement of fact material to the matter in hand."

In that case the defendant, who was Clerk of the Circuit and District Courts for that district, was indicted for perjury in swearing before the Dis-

trict Judge in his emolument returns and an account for services rendered to the United States. The Supreme Court held that such a paper was a "declaration" within the meaning of the section just quoted from, defining perjury.

It is contended by attorneys for defendants, however, that the only overt acts set forth in the indictment consists of the aforesaid "sworn statements" which were filed as preliminary papers by the various applicants whom the defendants induced to purchase land for their benefit. It is argued that these overt acts so alleged conclusively prove that the pleader was referring only to such "sworn statements" by the words "declarations" and "depositions". It must not be forgotten, however, that *conspiracy* is the crime charged in the indictment, and the act done to effect the object of the same merely affords a *locus penitentia,* so that before the act done either one or all the defendants may abandon their design and thus avoid the penalty prescribed by the statute. It follows therefore that the conspiracy must be sufficiently charged, and the indictment cannot be aided by the averments of acts done by one or more of the alleged conspirators in furtherance of the object of the conspiracy. It necessarily follows that such overt acts should not be considered in determining the proper construction to be given to the charging part of the indictment, because the pleader must have known what the law was upon this subject; and consequently

the overt acts alleged throw no light upon his intentions.

United States v. Britton, 108 U. S. 199;
Pettibone v. United States, 148 U. S. 197;
United States v. Milner, 36 Fed. 890;
In re Greene, 52 Fed. 111;
In re Benson, 58 Fed. 971.

Moreover, the defendants were not taken by surprise by this construction of the indictment, although it is true that Judge DeHaven, who presided at the first two trials of the case, restricted the evidence to proof of perjury in the preliminary "affidavit", or "sworn statement", of the applicant. The prosecution contended at each trial that the United States was entitled under the indictment to prove false swearing on the part of the applicants at the time of making the "final proof", as well at the time of filing the preliminary "sworn statement", or declaration of intention to purchase. Judge Hunt presided at the third trial of the case and sustained this contention on the part of the prosecution, and Judge Hunt had so ruled, as shown by the transcript of record. The prosecution put in evidence, without objection on the part of defendants, the "final proof" testimony of the applicant B. F. Jones. See transcript of record, pp. 175 to 183, both inclusive.

Moreover, the defendants, through their attorneys, specifically objected upon this third trial to an admission of any evidence tending to prove that the

applicants swore falsely in the preliminary paper called and designated a "sworn statement".

At p. 227 of the record, the following appears: "And thereupon the defendants objected to each of "said papers [the duplicate "sworn statements" or "preliminary application papers of Green Beard] "upon the ground that the indictment does not state "any indictable offense, and upon the further ground "that each of said papers varies from the indict- "ment; that it is not any DEPOSITION or declaration "such as is mentioned in the indictment; that it is "not such a paper as can be made the basis of an "indictment for perjury, and is variant from the "indictment. Whereupon the objection was over- "ruled by the Court, and the defendants excepted "to the ruling upon each paper, and their excep- "tions were allowed. And thereafter like applica- "tions of each and all of the other applicants here- "inbefore designated, except the applicant Jones, "was offered and received and put in evidence sub- "ject to the same objections and exceptions on be- "half of the defendants, and it was stipulated and "agreed that such objections should apply to each "of these sworn statements."

The words in brackets are inserted by the writer to explain the text; and at pages 237 and 238 of the record, the following appears:

"Mr. HENEY: We will offer these two papers in "evidence.

"Mr. BENNETT: For the purpose of making the

" record complete, we want to make the objection " we made on yesterday a little more elaborate. We " object to each of these papers upon the ground " that the indictment does not state any indictable " offense; upon further ground that each of these " papers varies from the indictment; that it is not " any DEPOSITION or declaration such as is mentioned " in the indictment; that it is not such a paper as " can be made the basis of an indictment for per- " jury, and is variant from the indictment. I would " like to have this objection go to each of these dif- " ferent papers without interposing it each time.

" The COURT: Have you any objection to that, " Mr. Heney?

" Mr. HENEY: None whatever.

" The COURT: It may be considered as applying " to all papers of like tenor to those now introduced.

" Mr. BENNETT: This is the sworn statement.

" The COURT: And the objections are overruled, " and the defendants allowed an exception."

Green Beard was then upon the stand, and he was only the second witness who had been called upon the part of the prosecution at that time, and consequently it is apparent that the attorneys for the defendants "commenced to blow hot and then to blow cold" at an early stage of the proceedings during this trial upon the questions of law which they now contend are vitally important in this case.

At and during the trial they contended that perjury could not be committed by an applicant in the pre-

liminary "sworn statement" that he is required to file when applying to purchase land under the Timber and Stone Act. And they then further contended that the words "declarations and depositions" which are used in the indictment do not mean or refer to said "sworn statement" or preliminary paper which must be filed by the applicant. Upon this appeal the attorneys for defendants are strenuously contending exactly to the contrary, and are now insisting that perjury could be committed by the applicant ONLY in his preliminary filing paper or "sworn statement", and that the words "declarations and depositions" as used in the indictment can refer and do refer ONLY to said "sworn statement".

This brings us naturally to a discussion of the next important question upon this appeal.

III.

THE SECRETARY OF INTERIOR AND COMMISSIONER OF GENERAL LAND OFFICE HAVE POWER TO MAKE REGULATIONS REQUIRING A PERSON APPLYING TO PURCHASE TIMBER LANDS, UNDER THE TIMBER AND STONE ACT, TO FURNISH EVIDENCE, UNDER OATH, AT THE TIME OF FINAL PROOF, THAT HE DOES NOT APPLY TO PURCHASE THE SAME ON SPECULATION, BUT IN GOOD FAITH TO APPROPRIATE IT TO HIS OWN EXCLUSIVE USE AND BENEFIT, AND THAT HE HAS NOT, DIRECTLY OR INDIRECTLY, MADE ANY AGREEMENT OR CONTRACT, IN ANY WAY OR MANNER, WITH ANY PERSON OR PERSONS WHATSOEVER, BY WHICH THE TITLE WHICH HE MIGHT ACQUIRE FROM THE GOVERNMENT OF THE UNITED STATES SHOULD INURE, IN WHOLE OR IN PART, TO THE BENEFIT OF ANY PERSON EXCEPT HIMSELF. SUCH REGULATIONS ARE REASONABLE AND NECESSARY TO GIVE EFFECT TO THE PROVISIONS OF THE TIMBER AND STONE ACT, AND CONSEQUENTLY WHEN MADE THEY HAVE THE FORCE AND EFFECT OF LAW; AND ANY PERSON WHO SWEARS FALSELY WHEN GIVING SUCH TESTIMONY IS GUILTY OF PERJURY UNDER SECTION 5392, REVISED STATUTES OF THE UNITED STATES.

Section 3 of an Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory (20 Stat. 89) reads as follows:

> "Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

The general power to make reasonable regulations for giving effect to the provisions of the Timber and Stone Act existed in the Commissioner of the Gen-

eral Land Office, however, by virtue of the provisions of the Revised Statutes of the United States, sections 441, 453 and 2478.

By the act of May 29, 1830 (4 Stat. 420), the right of pre-emption was given to certain settlers on the public lands. Section 3 was similar to the Timber and Stone Act, in that it required that prior to any entry "proof of settlement or improvement shall be made to the satisfaction of the register and receiver."

In *Lytle v. Arkansas,* 9 How. 314, 333, it was held that their decision was conclusive upon the questions of settlement and improvement, the Court saying:

> "The register and receiver were constituted, by the act, a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final."

Subsequently, and on July 4, 1836 (5 Stat. 107), Congress, without any repeal of the Act of 1830, passed an act to reorganize the General Land Office, the first section of which is as follows:

> "That from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the author-

> ity of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States."

This question, so far as any question her is concerned, was substantially carried forward into the Revised Statutes, as section 453, and is still in force. Under this law the case of *Barnard's Heirs v. Ashley's Heirs,* 18 How. 43, arose. It was there contended, in accordance with the prior cases, that the decision of the register and receiver was final and conclusive, but, the entries having been made on *ex parte* affidavits, the right of review by the Commissioner of the General Land Office was sustained, the Court saying:

> "The necessity of 'supervision and control', vested in the Commissioner, acting under the direction of the President, is too manifest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish, by *ex parte* affidavits, cultivation and possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the Commissioner's action in the instances before us, we hold to be true. But, if the construction of the act of 1836, to this effect, were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety."

The right of the Secretary of the Interior and of the Commissioner of the General Land Office to sup-

ervise the sale and disposition of the public domain has never been successfully questioned since the passage of said Act of 1836. In considering these powers under sections 441, 453 and 2478 of the Revised Statutes, Mr. Justice Lamar, speaking for the Court, in the case of *Knight v. Land Association,* 142 U. S. 161, said:

> "The phrase, 'under the direction of the Secretary of the Interior', as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the land department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the Government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the *supervising agent* of the Government to do justice to all claimants and preserve the rights of the people of the United States. As was said by the Secretary of the Interior on the application for the recall and cancellation of the patent in this pueblo case (5 Land Dec. 494): 'The statutes in placing the whole business of the department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the *rights of the public* and of private parties. Such supervision may be exercised *by direct orders or by review* on appeals.

The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to *facilitate* the department in the despatch of business, *not to defeat* the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him, and therefore he was without authority in the matter."

In the case of *Orchard v. Alexander,* 157 U. S. at page 385, the Supreme Court, speaking through Mr. Justice Brewer, says:

"While it is within the discretion of Congress to segregate any particular step in the proceedings for the disposal of the public lands from the scope of the general system, and place it outside of and beyond any supervising control of the higher officers, yet the courts should be

> satisfied that the language indicates an intention on the part of Congress so to do before any such break in the harmony of the system is adjudged."

The conclusions reached by Mr. Justice Lamar, in the case of *Knight v. Land Association,* are fully approved, and are reaffirmed in the case of *Orchard v. Alexander.*

The same rule was announced by the Supreme Court in the case of *Cornelius v. Kessel,* 128 U. S., at page 461, and, speaking through Mr. Justice Field, the Court there said:

> "The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

It should be noticed that the general power of supervision includes the right on the part of the

Commissioner of the General Land Office to annul entries of land allowed by the register and receiver of the local land office when the entry was made upon "FALSE TESTIMONY." This necessarily includes the power to adopt proper means by which to discover whether or not "false testimony" was given by the applicant in the Local Land Office. The power to annul an entry after it has been made necessarily includes the power to prevent an entry from being made in the first instance upon false testimony, and secondly includes the power to make proper rules and regulations to govern the character of testimony which shall be required, and the manner in which it shall be taken in order to affect the object and policy of the law.

Under the Timber and Stone Act an "entry" is not made until the final proof is made, and the applicant has paid his money to the Government through the local land officers, and has received his final certificate. In the case of *Parsons v. Venzke,* 164 U. S. at page 92, the Court, speaking through Mr. Justice Brewer, said:

> "An entry is a contract. Whenever the local land officers approve the evidences of settlement and improvement and receive the cash price they issue a receiver's receipt. Thereby a contract is entered into between the United States and the pre-emptor, and that contract is known as an entry. It may be like other contracts, voidable, and is voidable if fraudulently and unlawfully made. The effect of the entry is to segregate the land entered from the public domain, and while subject to such entry it can not be appropriated to any other person or for

any other purposes. It would not pass under a land grant, no matter how irregular or fraudulent the entry. When by due proceedings in the proper tribunal the entry is set aside and cancelled, the contract is also terminated. The voidable contract has been avoided. There is no longer a contract, no longer an entry, and the land is as free for disposal by the land department as though no entry had ever been attempted."

In the case of a Timber and Stone entry, as we have seen, the person desiring to avail himself of the provisions of the act, must file with the Register of the proper district, a written statement in duplicate, describing the land, and setting forth certain facts, including the statement "that he does not " apply to purchase the same on speculation, but in " good faith to appropriate it to his own exclusive " use and benefit, and that he has not directly or " indirectly made any agreement or contract, in any " way or manner, with any person or persons what- " soever, by which the title which he might acquire " from the Government of the United States should " inure in whole or in part to the benefit of any per- " son except himself".

It is provided further in the Act, that this statement must be verified by the oath of the applicant; that if any person taking such oath shall swear falsely in the premises he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for such lands, and all right and title to the same, and that any grant or con-

veyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

It further provides that, upon the filing of such statement, the Register of the Land Office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and that after the expiration of said sixty days, if no adverse claim shall have been filed, *the person desiring to purchase* shall furnish to the Register of the Land Office satisfactory affidavits, first, that said notice of the application prepared by the register as aforesaid, was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this Act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; and that, upon payment to the proper officer of the purchase money of said land, together with the fees of the Register and Receiver, as provided for in case of mining claims in the twelfth section of the Act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to *"enter"* said tract, and, on the transmission to the General Land Office of the

"papers and testimony" in the case, a patent shall issue thereon; provided, that any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and that evidence shall be taken, and the merits of said objection shall be determined by the Officers of the Land Office, subject to appeal, as in other land cases; and that "effect shall be given to the foregoing pro- " visions of this Act by regulations to be prescribed " by the Commissioner of the General Land Office".

In the first section of the Act it is provided, lands valuable chiefly for timber but unfit for cultivation and which have not been offered for public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre.

It is vitally important to notice that the clear intent of the statute is that such lands shall be sold *" in quantities not exceeding one hundred and sixty " acres to any one person or association of persons"*.

The land is not sold until the *"entry"* is made, or in other words, until the money has been received by the Government and the final certificate or receiver's receipt for the money is delivered to the applicant. The law expressly provides that not more than one hundred and sixty acres of land shall be

sold to any one person, and consequently it necessarily follows that no one person is entitled to secure a final certificate or receiver's receipt for any quantity of land in excess of one hundred and sixty acres.

It is contended by attorneys for defendants, that the applicant has the right to sell the land the moment that he has filed his "sworn statement" in duplicate with the Register and Receiver of the Land Office, declaring his intention and desire to purchase the land. If this contention is correct, it must be apparent that any one person could lawfully secure an assignment from ten thousand or more persons who had made applications to purchase one hundred and sixty acres of land each, and could produce those assignments at the Local Land Office and could thereby utterly and absolutely defeat the express purpose and intent of the law by thus compelling vast quantities of land to be "sold" to him by the United States at the minimum price fixed by the Government. A construction which would produce such absurd and evil consequences will not be adopted by the courts unless the language of the law clearly and expressly requires it.

The policy of the Timber and Stone Act is similar to that of the Homestead and Preemption Acts. It is to enable every citizen of the United States to profit by the generosity of the Government, by securing not to exceed one hundred and sixty acres of land, valuable chiefly for its timber, and by holding such land for his own profit and exclusive use and benefit

until it has increased in value through the development of the surrounding country. It is true that as soon as the land has been "sold" to him by the Government, or in other words, as soon as his "entry" has been allowed and accepted by his payment for the land, and the issuance to him of a final certificate or receiver's receipt, he can immediately resell the land to any person who may be willing to purchase it. The law contemplates, however, that every person who has sufficient means with which to purchase one hundred and sixty acres of timber land, exclusively for his own benefit, or who is able to borrow the money with which to make such purchase, will be able to retain the ownership thereof until he is offered and receives at least the then market price of that land. This being true, large quantities of such land would not be so apt to be acquired by any one person, or association of persons. If, however, persons without any means or credit whatsoever can apply to purchase such lands and sell the right to purchase from the Government immediately after filing such application, and before the land has in fact been sold to them, it necessarily follows that the very object and purpose of the Act will be consistently defeated, and that every person who desires to acquire large quantities of the public timber lands of the United States can do so by paying a nominal price for his right of purchase to every person who is willing to swear falsely, by filing an application stating that he desires to purchase the land for his own use and benefit.

In the case of *U. S. v. Budd,* 144 U. S. at page 163, the Supreme Court, speaking through Justice Brewer, in construing the Timber and Stone Act, said:

> "The Act does not in any respect limit the dominion which the purchaser has over the land *after its purchase* from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another *in the purchase. If when the title passes from the Government* no one save the purchaser has any claim upon it, *or any contract or agreement for it,* the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government; and any person knowing of that offer might rightfully go to the land office and make application *and purchase* a timber tract from the Government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement *prior to any purchase* from the Government, point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law. And in this respect the case does not rest on presumptions, for the testimony shows that Montgomery knew the statutory limitations concerning the acquisition of such lands, and the penalties attached to any previous arrangement with the patentee for their purchase. Nor is this a case in which one particular tract was the special object of desire, and in which, *therefore, it might be presumed that many things would be risked in order to obtain it;* for it is clear from the testimony that *not the land, but the timber* was Montgomery's

> object, and any tract bearing the quality and quantity of timber (and there were many such tracts in that vicinity) satisfied his purpose. This is evident, among other things, from the testimony of one Tipperry, upon which some reliance is placed by the Government, which was that Montgomery offered him one hundred dollars besides all his expenses if he would take a timber claim in that vicinity (no particular tract being named) and afterwards sell it to him."

It will be noticed that the Supreme Court assumes that Congress did not intend by this Act to in any respect limit the dominion which the purchaser would have over the land *"after it is purchased"* from the Government. The Court is particular to state, however, that the Act does denounce a "prior agreement", to wit, "the acting for another *in the purchase"*. And then the Court proceeds to say that the Act is satisfied "if *when the title passes* " *from the Government* no one save the purchaser " has any claim upon it, or any contract or agree- " ment for it".

We have seen that even the equitable title (which is evidently the one referred to by the Supreme Court) does not pass from the Government until the applicant pays the purchase money and receives his final certificate or receiver's receipt. It will be remembered that the Act itself, in section 3 thereof, provides that

> "After the expiration of said sixty days (of publication of notice), if no adverse claim shall have been filed, the person *desiring to purchase*

> shall furnish to the register of the land office satisfactory evidence", and that "upon payment to the proper officer of the purchase money of said land, together with the fees of the register and receiver", etc., "the applicant may be permitted to *enter* said tract, and on the transmission to the General Land Office of the papers and testimony in the case a patent shall issue thereon."

In other words, the person desiring to purchase is styled "an applicant" to purchase up to the time that he pays his money for the land, and thus becomes entitled to "enter" the tract for which he is applying. Up to the very moment that the Government accepts his money for the land, it can withdraw its offer to sell the same to him, or change the terms of its offer by appropriate legislation, and he would have no right or remedy which the courts could recognize. He has no *vested* right or interest in the land until his final proofs have been approved by the Register and Receiver, and his money accepted by them, and the Receiver's receipt for the same delivered to him. At that moment, but not until then, he becomes the purchaser of the land. That "entry" is the sale which is referred to in the first section of the Act by the provision that lands valuable chiefly for timber, but unfit for cultivation, "may be sold to citizens of the United States, or "persons who have declared their intention to "become such, in quantities not exceeding one hun- "dred and sixty acres to any one person, or asso- "ciation of persons, at the minimum price of two

" dollars and fifty cents per acre". No one person is permitted to "purchase" from the Government more than one hundred and sixty acres of land, and the Act denounces a prior agreement "the acting for another *in the purchase*". When the title passes from the Government (to wit, when the final proof is made, and the money paid for the land, and the "entry" is allowed), if "no one save the purchaser " has any claim upon it, or any contract or agree- " ment for it, the Act is satisfied". And, on the contrary, if any person has a claim upon it, or if the record purchaser, or applicant to purchase, has sold or agreed to sell it at any time prior to the making of his final proof, and his payment of the purchase price to the Government for the land, the law is violated.

The case of *United States v. Budd,* is instructive in other particulars, and it will be referred to again in discussing the objections to evidence which have been urged by the attorneys for defendants, in the cases at bar.

In the case of *Hawley v. Diller,* 178 U. S., page 481, the Supreme Court, speaking through Justice Harlan, in sustaining the power of the Secretary of the Interior upon his own motion to set aside, cancel and annul an "entry" of timber land, upon the ground that the applicant made the entry in the interest of another person, says:

> "In the course of his opinion Secretary Smith said that there was no charge nor was there

> any testimony affecting the transaction between Bailey and his transferees. He also said that his interpretation of the statute did not imply that a timberland entryman was not authorized to sell his entry at any time that he chose *after he had made his proof and received his certificate.*"

By clear inference and strong implication, it is held that the applicant cannot sell his right to enter the land *before* he has made his proof and received his certificate.

At page 488 of the Opinion, in the same case, the Court says:

> "It is contended that the Land Department was without jurisdiction to cancel the original entry. The exclusion of mere speculators from purchasing the public lands referred to in the Timber and Stone Act would be of no practical value if it were true that one having purchased in good faith from an entryman who is proved to have sworn falsely in his application, could demand, of right, that a patent be issued to him. The Land Department has authority, at any time before a patent is issued, to inquire whether the original entry was in conformity with the Act of Congress. *Knight v. United States Land Association,* 142 U. S. 161, and *Michigan Land & Lumber Co. v. Rust,* 168 U. S. 589, 593, and authorities cited in each case. Of course, that Department could not arbitrarily destroy the equitable title acquired by the entryman and held by him or his assignee."

The word "application" in the foregoing quotation is unquestionably used in the broad sense of including all the proceedings from the time the party desiring to purchase files his "written state-

ment'' or ''sworn statement'', up to and including the making of his final proof, and the payment of his purchase money, and the delivery to him by the Receiver and Register of the Land Office of his final certificate by the Receiver's receipt.

But it is contended by the attorneys for defendants that it is not the policy of the Timber and Stone Act to deprive an applicant of the right to sell his privilege to purchase, before he has actually exercised the same by making final proof and paying for the land, provided, only, that he does not enter into any agreement to sell the land prior to the filing of his preliminary ''written statement'' or ''sworn statement'' in and by which he gives notice that he desires to purchase the land. They state the case of *Adams v. Church,* 193 U. S. 510, as conclusive upon this point. That case deals with the entry under the ''Timber Culture'' Act, which is ''An Act to '' encourage the growth of timber on the western '' prairies''.

Upon filing his preliminary affidavit under that Act with the Receiver and Register, and on payment of ten dollars, if the tract applied for is more than eighty acres, and five dollars if it is eighty acres or less, the applicant is immediately permitted to *''enter''* the quantity of land specified. In other words, he then immediately acquires a *vested* interest in the land of which he cannot be arbitrarily deprived by the Government, by legislation or otherwise. Moreover, as soon as he has been permitted

to "enter" the land the party is required, if he has made an entry of a quarter section, "to break or "plow five acres covered thereby the first year; five "acres the second year, and to cultivate to crop, or "otherwise, the five acres broken or plowed the first "year; the third year he shall cultivate to crop, or "otherwise, the five acres broken the second year, "and to plant in timber, seeds or cuttings, the five "acres first broken or plowed, and to cultivate and "put in crop, or otherwise, the remaining five acres; "and the fourth year to plant in timber, seeds or cut- "tings, the remaining five acres. All entries of less "quantity than one-quarter sections, shall be "plowed, planted, cultivated to trees, tree seeds, or "cuttings in the same manner and in the same pro- "portion as hereinbefore provided for the quarter "section," etc.

It must be at once apparent that this "Timber Culture Act" is in no way analogous to the Timber and Stone Act. All the provisions of the Timber Culture Act are intended and calculated to benefit the Government, and the public generally, as much as the applicant. He is required to expend his time and money in improving and cultivating the land, and he cannot acquire title until the expiration of eight years from the date of his entry. And he must then prove "that not less than twenty-seven "hundred trees were planted on each acre, and that "at the time of making such proof there is still "growing at least six hundred and seventy-five liv-

" ing and thrifty trees to each acre." The applicant under that Act acquires a vested interest in the land the moment his application is accepted by the Register and Receiver of the Land Office. His entry having been allowed, and the proper Land Office fees having been paid, he becomes the equitable owner of the land, subject, of course, to the conditions precedent which are prescribed by the law. At the time he makes his entry, he may be perfectly able, financially, to comply with the provisions of the law, but before the expiration of the long period of eight years, he may have become financially embarrassed, or may have other reasons to desire to remove from the vicinity of the land, and it would be a great hardship and unconscionable condition if he were not permitted to sell his interest in the land to any other person who would be willing to accept and comply with the conditions prescribed by the law. It is not the policy of that law to prevent the original entryman from conveying his interest in the land before the issuance of patent, because it is to the advantage of the Government to have the provisions of the law complied with in respect to the planting of trees thereon by some person, and it is immaterial whether this planting is done by the original applicant or his assignee.

None of the reasons which apply to the Timber Culture Act have any bearing whatever upon the beneficent provisions of the Timber and Stone Act. Under the latter law, the applicant is not required

to do anything to improve the land, or to benefit the applicant or general public, and he is permitted to acquire title to the land at a price which is far below the market value of the timber alone which is on the land, in the great majority of instances. The provision in the Timber and Stone Act, that the land shall not be sold to any one person, or association of persons, in quantities exceeding one hundred and sixty acres, is as clear an expression of legislative intent as a direct prohibition against the alienation of the land prior to purchase. And particularly so when read in connection with sections 2 and 3 of the Act. It is inconceivable that Congress intended to permit a person to sell his privilege to purchase before he had acquired any vested interest in the land. If this is the proper construction of the law, it is difficult to understand why Congress required the applicant to file a "written statement", under oath, alleging "that he does not apply to purchase " the land on speculation, but in good faith to appro- " priate it to his own exclusive use and benefit, and " that he has not, directly or indirectly, made any " agreement or contract, in any way or manner, " with any person or persons whatsoever, by which " the title which he might acquire from the Govern- " ment of the United States, should inure, in whole " or in part, to the benefit of any person except him- " self".

It is submitted, therefore, that the whole policy of the Government, in respect to its timber lands,

can be thwarted if the applicant is permitted to alienate the land prior to the consummation of his purchase, by the payment of the purchase price to the Government, and the approval of his final proof and allowance of his entry.

If it is the policy of the Timber and Stone Act to withhold the power of alienation from the person desiring to purchase the land until he has completed his entry by making his final proof, and paying the purchase price for the land, it necessarily follows that the Commissioner of the General Land Office not only possesses authority to make rules and regulations requiring the applicant to testify, at the time of making final proof, that he does not apply to purchase the land on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States, should inure, in whole or in part, to the benefit of any person except himself; but it is the unquestioned duty of the Commissioner of the General Land Office to make and enforce such rules and regulations for the protection of the Government.

We are, therefore, naturally led to the inquiry, Has he done so?

This Court will take judicial notice of the rules and

regulations made by the Land Department regarding the sale or exchange of public lands.

Caha v. U. S., 152 U. S. 211.

It appears from the transcript of record, in the cases at bar, that such rules and regulations were made by the General Land Office very shortly after the passage of the Timber and Stone Act, requiring the aforesaid character of testimony to be given by the applicant, under oath, at the time of his making final proof. The rules and regulations required this evidence to be given in the form of "depositions". It was so given by many of the applicants, in the cases at bar, who were suborned by the defendants to commit perjury, and the indictment charges that some of the false swearing was to be done by the applicants in such "depositions" at the time of their making final proof.

Does false swearing by the applicant in his deposition at the time of making final proof constitute perjury, under Section 5392, Revised Statutes of the United States; provided the false swearing is in regard to the aforesaid matters and things, which the applicant is required to testify about under said rules and regulations of the General Land Office?

If we are right in our contention as to the policy of the Timber and Stone Act, the aforesaid rules and regulations of the Land Department are reasonable, and are well calculated to carry into effect the intent and true meaning of the Act of Congress.

In the case of *Cosmos Exploration Co. v. Gray Eagle Oil Co.,* 112 Fed. Rep., at pages 11 and 12, this Court said:

> "The Commissioner of the General Land Office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the acts of Congress, have the force and effect of laws. The regulations of the Commissioner relative to lieu land selections under the act of June 4, 1897 (prescribed June 30, 1897), are, in our opinion, reasonable, and evidently were intended and are well calculated to carry into effect the intent and true meaning of the act of Congress. They are properly within the limitations of the law for the enforcement of which they were promulgated and should be complied with. *Anchor v. Howe,* (C. C.) 50 Fed. 366; *Iron Co. v. James,* 32 C. C. A. 348, 89 Fed. 811; *Hoover v. Salling,* (C. C.) 102 Fed. 716, 720; *Poppe v. Athearn,* 42 Cal. 606, 609; *Chapman v. Quinn,* 56 Cal. 266, 273."

This case was affirmed by the Supreme Court of the United States in *Cosmos Exploration Co. v. Gray Eagle Co.,* 190 U. S. 301, decided May 18, 1903.

Hence, it necessarily follows that the law of the United States, to wit: the Timber and Stone Act, coupled with said rules and regulations of the General Land Office, which have the force and effect of laws, authorizes an oath to be administered to an applicant for timber lands at the time he is making final proof, in accordance with the aforesaid rules and regulations, and if he swears falesly in his deposition so taken at said time, in relation to

material matters and things about which he is required to testify, by the provision of said Timber and Stone Act and the aforesaid rules and regulations so made to affect the objections thereof, he is guilty of perjury, under section 5392 Revised Statutes of United States.

It is contended by defendants that such false swearing can not constitute perjury, because Congress can not delegate to the General Land Office the power to create crimes by its rules and regulations, or in any other manner. This is clearly begging the question. The rules and regulations of the Land Department do not create any crime. The applicant to purchase lands under the Timber and Stone Act, is not compelled to testify falsely or at all, at the time he is called upon by the Land Department to make final proof. If he cannot testify truthfully at that time "that he does not apply to " purchase the land on speculation, but in good faith " to appropriate it to his own exclusive use and " benefit, and that he has not, directly or indirectly, " made any agreement or contract, in any way or " manner, with any person or persons whatsoever, " by which the title which he might acquire from the " United States should inure, in whole or in part, " to the benefit of any person except himself", it is his plain duty to either abandon his application to purchase the land, or testify truthfully as to these facts, and contest the right of the Land Department to refuse to permit him to, nevertheless, purchase the land, or to absolutely refuse to testify at all upon

these questions on the ground that the Timber and Stone Act does not require him to do so, and does not authorize the Land Department to make rules and regulations requiring him to do so. The applicant can choose any one of these three courses to suit himself. If he chooses, however, to comply with the requirements of the rules and regulations of the Land Department, and to testify in regard to these questions, he cannot swear falsely as to these facts, and thereafter excuse himself upon the ground that the Land Department had no authority to require him to testify upon that subject. The rules and regulations of the Land Department do not create the crime of perjury, but they do furnish the place and opportunity for the commission of the crime by the applicant, if he wilfully and corruptly desires to swear falsely as to these matters and things.

In the early case of *United States v. Bailey,* 9 Peters, 238, the Supreme Court, speaking through the learned Justice Story, said:

> "This perjury was not merely a wrong against that tribunal or a violation of its rules or requirements; the tribunal and the contest only furnished the opportunity and the occasion for the crime, which was a crime defined in and denounced by the Statute."

In that case the defendant was indicted for making a false affidavit before a justice of the peace of the Commonwealth of Kentucky in support of a claim against the United States. It was contended that the justice of the peace, and officer of the State,

had no authority under the acts of Congress to administer oaths, and that, therefore, perjury could not be laid in respect to a false affidavit before such officer. It appeared, however, that the Secretary of the Treasury had established, as a regulation for the government of his Department and its officers in their action upon claims, that affidavits taken before any justice of the peace of any of the States should be received and considered in support of such claims. And upon the strength of this regulation the conviction of perjury was sustained, Mr. Justice McLean alone dissenting. It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this, notwithstanding the fact that such justice of the peace was not an officer of the United States. The case at bar is, of course, much stronger.

The case of *U. S. v. Bailey,* was quoted and approved by the Supreme Court of the United States, in the case of *Caha v. United States*, 152 U. S. 219, and the opinion of the Court was delivered by Mr. Justice Brewer. In rendering the opinion, the Court not only approved and adopted the law, as stated in the case of *U. S. v. Bailey,* but expressly reviewed the case of *U. S. v. Eaton,* 144 U. S. 677, and pointed out the fact that there is not anything in it conflicting with the views expressed in *U. S. v. Bailey*, and in *Caha v. United States.*

In the two last mentioned cases, the regulation of the Department merely "furnished the opportunity " and the occasion for the crime, which was a crime " defined in and denounced by the statute". Whereas, in the case of *U. S. v. Eaton,* the regulations of the Department did not merely furnish the opportunity and the occasion for the crime, which was defined in and denounced by the statute, but on the contrary the regulations of the Department created the crime by making it the duty of certain persons to keep certain books and by making it an offense not to do so. In that case a person could commit the alleged offense without any affirmative or wilful or corrupt act upon his own part.

In referring to the *Eaton* case, the Supreme Court, in *Caha v. United States,* at page 220, said:

> "This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of section 5392. We have no doubt that false swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of said section."

Yet the statute did not expressly authorize a land contest before the Local Land Office in respect to a homestead entry.

The same principle was applied by the Supreme Court, speaking through Chief Justice Fuller, in the case of *In re Kollock,* 165 U. S. at page 533.

In that case, Kollock was convicted as a retail dealer in oleomargarine of knowingly selling and delivering one-half pound of that commodity, which was not packed in a wooden or paper package bearing thereon any or either of the marks or characters provided for by the *regulations* and set forth in the indictment. It was conceded that the stamps, marks and brands were *prescribed by the regulations,* and it was not denied that Kollock had the knowledge, or the means of knowledge, of such stamps, marks and brands. But it was argued that the statute was invalid because it does not define what act done or omitted to be done shall constitute a criminal offense, and delegates the power to determine what acts shall be criminal by leaving the stamps, marks and brands to be defined by the Commissioner. The Supreme Court said:

> "We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. But here the law required the packages to be marked and branded; prohibited the sale of packages that were not; and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps and brands to be used. The criminal offense is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legis-

> lation which created the offense. We think the act not open to the objection urged, and that it is disposed of by previous decisions. United States v. Bailey, 9 Pet. 238; United States v. Eaton, 144 U. S. 677; Caha v. United States, 152 U. S. 211."

In the same opinion the Court approves what was said of the *Bailey* case and in the *Caha* case, and likewise approves the *Eaton* case as being consistent with both the *Bailey* case and the *Caha* case. It points out the distinction between the *Eaton* case and the *Kollock* case, as well as between the *Eaton* case and the *Bailey* case and *Caha* case.

In the *Eaton* case it was held that the mere "neglect" to do a thing required by a regulation made by the President or a Department could not be made a criminal offense where the statute did not distinctly make the "neglect" in question a criminal offense. The Supreme Court pointed out the obvious fact that the mere "neglect" to do something required by a regulation of the Department was a far different matter than is a case where no violation of the regulation is charged, and where on the contrary the party committed the offense by complying with the regulation and in violating an express statute defining his crime while doing so.

In the case at bar the defendants are not charged with having violated any regulation of the General Land Office. On the contrary, they conspired to induce a large number of persons to comply with the regulations of the General Land Office by testifying

at the time of making final proof, fully and completely, to all questions which are required by said regulations to be asked of them. While complying with those regulations, however, the applicants were to violate an express statute, to wit: Section 5392 of the Revised Statutes of the United States, by testifying falsely in answer to the questions propounded to them under the regulations of the Department, for the purpose of effecting the object of the Timber and Stone Act to prevent any one person from purchasing more than one hundred and sixty acres of timber land from the Government, and to prevent any person from acting for another in making such purchases.

The case of *Ralph v. United States,* 9 Federal Reporter 693, is also instructive. In that case a regulation of the Treasury Department required that an affidavit of the surety upon a certain character of bond should be made before some officer qualified to administer an oath, signed by the surety, and setting forth his pecuniary responsibility. Such an affidavit was signed by the defendant before a proper officer, and he was indicted for perjury, on account of the false statements contained therein. On the trial of the case before the District Court, the affidavit was offered in evidence, and objection was made on the ground that it was not an instrument required by law to be sworn to, and therefore, a false statement contained therein did not constitute perjury. Upon appeal, the Circuit Court, in construing the action of

the District Court, in passing upon a motion for new trial, said:

> "It is claimed by the plaintiff in error that his rights were sacrificed by the action of his counsel in the district court. Of that the district court was a competent judge, and it is to be observed that the counsel himself, who acted for the plaintiff in error in the district court, was not heard, and his affidavit was not taken, and therefore his statement of the facts, and of the circumstances which operated upon him, is not before us. He is said to have relied upon a view which he took of the law of the case which he thought conclusive, namely, that there was no statute which required an affidavit of the kind which is the subject of controversy in this case. If that were so, then it was a misapprehension, we think, of the law which declares that certain officers of the treasury department, as well as the secretary himself, may make certain rules and regulations relating to the duties of their several offices. There can be no doubt it was competent for a regulation of the kind in controversy here to be made by the proper officer of the treasury, namely, that before a bond should be accepted, which might authorize the delivery under the law then in force, of stamps on credit to a manufacturer of matches, an affidavit should be made showing the responsibility of the sureties, and therefore this was an affidavit authorized by law; and if the statements contained in it were false, and known to be so by the person making them, then upon it perjury could be assigned. The judgment and sentence of the district court will be affirmed."

The case of *United States v. Hearing,* 26 Federal Reporter, at page 744, is also instructive. In that

case, the opinion was written by Deady, Judge. In that case, Judge Deady said:

> "The oath of the applicant to the affidavit or the excusatory facts is not compulsory. But whoever wishes to have the benefit of the homestead act must show in some way the existence of the facts which entitle him thereto; and these, when not of record, being within the applicant's knowledge, may be shown by his own oath. As to the facts showing the qualification of the applicant and his purpose in making the entry, the statute expressly permits and requires them to be proven by his oath; and if there were no specific direction in the statute on the subject, I think he would be allowed to do so as a matter of course. And this is the condition of the statute in regard to these excusatory facts. The mode of their proof is not prescribed, and convenience, usage and necessity all point to the oath of the party as the proper evidence of their existence. *Certainly it would be within the power of the department to make a regulation on the subject, permitting or prescribing this mode of proof in such a case.*"

Judge Deady, after discussing the *Bailey* case, approvingly, further says:

> "So here, the statute not having prescribed the mode of proving the excusatory or preliminary facts, a regulation of the department might direct or permit that it be done by some such recognized mode of proceeding as the oath of the applicant, and thereupon such oath when taken is administered, in effect, under or in pursuance of a law of the United States, and therefore perjury may be assigned thereon. Whether such a regulation exists or not is a matter within the judicial knowledge of the court; that is, it is a matter about which the court may inform itself."

And in the same case, Judge Deady further says:

> "If the defendant was sworn to the affidavit set out in the complaint, before the clerk, and the same was false to his knowledge in any one of the particulars alleged, an indictment for perjury may be maintained thereon."

In the case of *Prather v. United States,* 9 Appeal Cases, District of Columbia, 82, the Court of Appeals, in passing on one of the oleomargarine cases, at page 87, said:

> "The constitutionality of Section 6 of the Statute is called in question, on the ground that is does not itself completely define and declare any offense against the United States; that it leaves it to the Commissioner of Internal Revenue and the Secretary of the Treasury to determine by their regulation what shall constitute a criminal offense against the United States, inasmuch as they are to determine the stamp or marking, the omission or falsification of which constitutes the offense, as it is claimed; and that this is a delegation of legislative power which it is incompetent for Congress under the Constitution to attempt. * * *
>
> "But we do not think that the criminal liability in the present instance is the creation or the result of departmental or official regulation. It seems rather to fall into the category of offenses indicated in the case of Caha v. United States, supra, in which Congress has fully declared the offense, and departmental regulation has merely afforded the opportunity for its commission."

In the case of *United States v. Dastervignes,* 118 Federal Reporter, 199, the Circuit Court, for the Northern District of California, by Beatty, District

Judge, in discussing a question similar to the one at bar, said:

> "It is not doubted that a legislative body cannot delegate its authority to others to make laws; but that it may authorize the formulation of rules to enforce its laws, not simply according to their letter, but to the full extent of their spirit and object, has been too long held to be now doubted. To this should be added that such laws and the rules in pursuance thereof should not be strictly construed against the government, but liberally in its favor. The Government is but the people en masse. Its laws are their laws, in which all are alike interested, and to the defense of which none are individually called. Strict construction might soon, with only such defense as the general public would give, result in such enervation as to render them valueless. Upon the same principle that laches is not imputed to the Government, a liberal construction of the laws in its favor should follow.
>
> "In this case the authority is expressly stated to be for the purpose of securing the objects of such reservations, and then enumerates as one of such objects the regulation of their occupancy and use. The simple test to be applied to this case is the one before referred to: Is it authority to make a law or to enforce one already made? A brief examination of a few of the authorities will aid to a reply; and such examination is pertinent, because of the fact that two of the District Courts have held, in criminal cases, these rules invalid. Before doing so, however, it is suggested that in many matters concerning which Congress is called upon to legislate, and especially in those which are largely under the management of some chief department of the Government, it is impossible that all the minutiae for the enforcement of such laws can be foreseen and provided

> for by special provisions. Necessarily much must be left to the executive officer. Congress indicates the objects it has in view. It embodies in general terms the matters to be accomplished and aims to be reached, and leaves the duty of enforcement to the proper executive officer. Hence the necessity, as has been the practice from the institution of the Government, of authorizing such officers to make the proper rule for the enforcement of the law."

The regulations of the General Land Office, in the cases at bar, were made for the purpose of effectuating the policy, intent and purpose of the Timber and Stone Act, and they are authorized by the Act itself in the language heretofore quoted from Section 3 thereof, that "effect shall be given to the foregoing " provisions of this Act by regulations to be pre- " scribed by the Commissioner of the General Land " Office".

Regulations in question are not repugnant to the acts of Congress, and they are reasonable and well calculated to carry into effect the intent and true meaning of the Timber and Stone Act, and consequently they "have the force and effect of laws", as this Court said in the case of *Cosmos Exploration Company v. Gray Eagle Oil Company,* 112 Fed. Rep. at page 11.

We respectfully submit, therefore, that the trial court did not err in holding that the Government was entitled to prove, under this indictment, that the defendants conspired to induce and suborn certain of the entrymen to commit perjury in their final

proofs, by falsely swearing that they had made no contract or agreement to sell the land at any time prior to the making of such final proof.

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